IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

Judges: William B. Murphy, Richard Allen Griffin and Helene N. White

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CITY OF TAYLOR,

Plaintiff/Appellee,

v

THE DETROIT EDISON COMPANY,

Defendant/Appellant

/

Supreme Court No. 127580

Court of Appeals No. 250648

Wayne County Circuit Court
Case No. 02-221723-CZ

BRIEF ON APPEAL – APPELLANT THE DETROIT EDISON COMPANY

* * * ORAL ARGUMENT REQUESTED * * *

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JURISDICTIONAL STATEMENT

Defendant/Appellant The Detroit Edison Company ("Edison") applied for leave to appeal from City of Taylor v Detroit Edison Co, 263 Mich App 551; 689 NW2d 482 (2004), lv granted 474 Mich 877 (2005) (183a-98a). On October 6, 2005, this Court granted leave to appeal (200a). This Court has jurisdiction to review this case by appeal. MCR 7.301(A)(2); MCR 7.302(G).

STATEMENT OF QUESTIONS INVOLVED

Plaintiff/Appellee City of Taylor (the "City") wanted utilities to remove their poles, lines and other overhead equipment from alongside a four-mile stretch of Telegraph Road in the City, and install replacement facilities underground. Edison was willing to work with the City, but advised that the City would have to pay for the underground replacement pursuant to Michigan Public Service Commission ("MPSC" or "Commission") rules (114a-15a). The City responded by quickly passing an ordinance requiring utilities, including Edison, to solely bear the costs of this underground replacement (116a-23a). This Court granted Edison's application for leave to appeal, and directed the parties to address three issues.[1]

1. **WHAT "REASONABLE CONTROL" OF THE USE OF ITS STREETS BY UTILITIES DID CONST 1963, ART 7, §29 "RESERVE" TO THE CITY?**

   The **Wayne County Circuit Court** found that Const 1963, art 7, §29 granted municipalities "reasonable control" of their streets, and required utilities to obtain franchises from municipalities, and that "the power to determine who should pay the costs of relocation is included within the right to grant a franchise." (Opinion, 138a).

   The **Court of Appeals** affirmed, and relevantly stated:

   > "Local units of government retain the right to the reasonable control of their rights-of-way. Const 1963, art 7, §29 [citations omitted].

[1] Edison recognizes the usual format for this section (MCR 7.212(C)(5)), but the Court has stated issues that do not lend themselves to "yes" or "no" responses. For the Court's convenience, and at the risk of oversimplification, Edison has attempted to provide accurate and succinct answers to the Court's questions. Edison's attempt here should not be deemed to limit Edison's positions, as further discussed below.

> Where the state occupies the field, the right to reasonable control is subject to the paramount authority of the state, except concerning matters that are "strictly referable" to the reasonable control of the streets. . . . Here, the state has not purported to occupy the field regarding a municipality's authority over the location of power lines, or the allocation of related costs." 263 Mich App at 556-57 (citation and footnote omitted, 188a-89a).

Appellant Edison states that the "reasonable control" of the streets "reserved" to the City is limited to matters of local concern, and must yield to state control over statewide interests. Specifically:

a. The Legislature authorized the MPSC to regulate the rates, terms and conditions of utility service.

b. The MPSC enacted rates based on overhead power lines, and rules and tariff provisions governing payment of the costs for replacing existing overhead power lines with underground facilities.

c. The MPSC's provisions concern the State's interest in controlling utility rates as well as the safety and consistent standards for the installation of utility facilities.

d. The City has no "reserved" authority to force a utility to expend large amounts of money to replace its overhead power lines with underground facilities, then pass these expenditures on to customers across the state in the form of higher rates.

Appellee City presumably would support the Court of Appeals' statement.

2. DOES THE "REASONABLE CONTROL" OF THE STREETS THAT WAS "RESERVED" TO THE CITY INVARIABLY ALLOW THE CITY TO SHIFT THE COSTS OF RELOCATING UTILITY EQUIPMENT TO UTILITIES?

The **Wayne County Circuit Court** stated: "As long as the City is exercising a governmental function, the utility must bear the relocation costs" (Opinion, 138a).

The **Court of Appeals** stated that "relocation costs may be imposed on the utility if necessitated by the municipality's discharge of a governmental function, while the expenses must be borne by the municipality if necessitated by its discharge of a proprietary function" 263 Mich App at 557-58 (189a-90a).

Appellant Edison states that:

a. The costs to replace utility lines underground must be allocated in accordance with the MPSC's rules, rates and tariff provisions. This is a statewide concern that is controlled by statewide regulation.

b. The "reasonable control" of the streets "reserved" to municipalities does not include the authority to shift costs for replacing overhead utility facilities with underground facilities to utilities and their ratepayers.

c. The "governmental/proprietary rule" should be rejected as unsound and unworkable.

Appellee City would presumably support the Court of Appeals' statement.

3. HOW CAN THE "REASONABLE CONTROL" OF THE STREETS "RESERVED" TO THE CITY BE RECONCILED WITH THE MPSC'S BROAD AUTHORITY TO REGULATE UTILITIES?

The **Wayne County Circuit Court** found that the City's ordinance required Edison to pay the costs of replacing its overhead facilities with underground facilities, and that the MPSC's authority and regulations were irrelevant (Opinion, 136a-39a).

The **Court of Appeals** affirmed, essentially finding that the City's ordinance was not preempted, and asserting that the MPSC's statewide regulatory scheme contemplates and yields to municipal ordinances requiring utility lines to be placed underground. 263 Mich App at 560-62 (192a-94a).

Appellant Edison states that the City's "reasonable control" of the streets is expressly preempted by the MPSC's statewide regulation of utilities. Since the MPSC has enacted rules and tariff provisions controlling the cost allocation for replacing overhead facilities with underground facilities, a City cannot avoid its cost responsibility under that statewide regulation, or shift those costs to utilities, by enacting a self-serving ordinance purporting to require utilities to pay the City's costs.

Appellee City would presumably support the Court of Appeals' statement.

To the extent that this Court does not completely resolve this case, and a remand is necessary, Edison respectfully suggests that the following issue should also be addressed by the Court:

4. DOES THE MPSC HAVE PRIMARY JURISDICTION TO DETERMINE THE APPLICABILITY AND INTERPRETATION OF ITS RULES, RATES, AND TARIFF PROVISIONS RESPECTING THE REPLACEMENT OF EXISTING OVERHEAD FACILITIES WITH UNDERGROUND FACILITIES?

The **Wayne County Circuit Court** answered "No."

The **Court of Appeals** answered "No."

Appellant Edison answers "Yes." When underground replacement cases arise, they must be heard by the MPSC under the primary jurisdiction doctrine. That would also include any

remand proceedings in this case, if the Court's opinion does not resolve all of the remaining issues.

Appellee City presumably would answer "No."

INTRODUCTION

The City of Taylor (the "City") requested that The Detroit Edison Company ("Edison") remove its utility poles and overhead lines and equipment from alongside a four-mile stretch of Telegraph Road in the City, and replace them with new underground lines and equipment (often called "undergrounding"). On May 4, 2000, Edison advised the City that it would do so, but the City would have to pay for the "undergrounding" pursuant to Michigan Public Service Commission ("MPSC" or "Commission") Rule 460.516 (114a-15a). In response, the City quickly passed an ordinance requiring utilities to "immediately" remove their poles, lines and other overhead equipment, and install replacement facilities underground at the utilities' expense (116a-23a). As explained below:

1. The "reasonable control" of the streets that Const 1963, art 7, §29 "reserved" to the City is limited to matters of purely local concern, and yields to state control over statewide interests. The MPSC has broad statewide authority over rates, terms and conditions of utility service.

2. The allocation of costs for the replacement of overhead utility facilities with underground lines is a statewide matter directly affecting the rates, terms, and conditions of utility service. The City has no authority to order a utility, and ultimately its customers, to pay this expense, absent express permission from the Commission. The MPSC's rates for electric utility service are based on overhead facilities (the standard and most economical way to provide electricity to customers), and the MPSC's controlling rules and tariff provisions require that those requesting the replacement of existing overhead facilities with underground facilities must pay the resulting costs, which are often substantial ($14.5 million in this case). The City cannot lawfully shift these costs to Edison, and ultimately its ratepayers, by unilaterally adopting a self-serving ordinance that directly contradicts the MPSC's rules and tariff provisions.

3. Terms and conditions of utility service include the underground replacement of utility facilities, as well as other safety and engineering specifications that are within the MPSC's specialized expertise and broad authority. The City is preempted by, and has no authority to deviate from, the MPSC's statewide control over these matters.

4. To the extent that any issues remain to be resolved following this Court's decision, this matter should be remanded to the MPSC to exercise its primary jurisdiction to decide these issues.

STATEMENT OF FACTS

Edison provides retail electric service to approximately 2.1 million customers who are located primarily in Southeast Michigan. Edison's electric distribution system covers all or part of more than 384 cities, villages and townships in a service territory of approximately 7,600 square miles. Edison's electric lines are attached to over one million utility poles, which span tens of thousands of miles of public streets and roads.

More than thirty years ago, the MPSC conducted extensive proceedings to evaluate overhead versus underground electric utility facilities. Among other things, the MPSC found that (1) burying electric facilities increases a utility's cost to serve its customers; (2) it would be unreasonable to charge higher rates to customers who are served by overhead facilities, in order to provide underground service for relatively few customers; and (3) customers who directly benefit from the burial of electric facilities should pay the extra costs involved in providing underground service (August 10, 1970 Electric Rules Order in MPSC Case No. U-3001, pp 2-3, findings C, D, and E, 19a-20a). In accordance with those findings, and through that same Opinion and Order (Id. p 3, finding H, Order § 1, 20a), the MPSC adopted Rules and Regulations Governing the Extension of Underground Electric Distribution Lines. MPSC Rule 460.516, which is entitled "**Replacement of**

Existing Overhead Electric Facilities," provides that a customer choosing to replace existing overhead lines with underground facilities must pay the extra costs associated with that replacement (27a). Similarly, the MPSC-approved Tariff for Edison's electric service requires municipalities or other persons requesting underground utility lines to pay for the cost of underground replacement in accordance with MPSC Rule 460.516 (MPSC Tariff No. 9, § B-3.4 (1)(f); § B-3.4(5)(a)(1); §B-3.6(3)(b)(3), 47a, 52a, 58a).

It is undisputed that Edison legally installed utility poles and overhead electric lines along Telegraph Road in the City.[2] It is also undisputed that Edison's overhead lines continued to function properly, and that Edison maintained those lines to serve the City and its other customers in the City, with no dispute regarding Edison's legal right to be there. This case arose because the City began a beautification project that included removing all utility poles, lines and other overhead equipment along approximately four (4) miles of Telegraph, and replacing those facilities with underground facilities. Edison was willing to work with the City on the project, but Edison advised the City that (1) electric rates in Michigan are based on overhead facilities, (2) the City must pay to replace the existing overhead facilities with underground facilities pursuant to MPSC Rule 460.516, and (3) the MPSC has primary jurisdiction and control over electric utilities in Michigan, so any dispute over interpretation of the MPSC rules must be presented first to the MPSC, and not to the courts (May 4, 2000 letter, 114a-15a).[3]

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[2] Telegraph Road "was so named due to the telegraph lines running alongside the road for a great distance more than a century ago." (www.michiganhighways.org /listings/MichHwys20-29.html).

[3] This case does not concern whether Edison will replace its overhead lines with underground lines. Edison regularly (subject to safety and other applicable considerations) works with such underground replacement requests. Indeed, MPSC Rule 460.516 and Edison's Tariff anticipate and address such matters. The question here is who must pay for the cost of the City's underground replacement.

The City responded by quickly passing an ordinance that shifted the liability for underground replacement costs from the City to Edison (and ultimately its customers). On May 16, 2000, just days after the City received Edison's letter, the City enacted new Ordinance No. 00-344, purporting to require all public utilities (Edison and others attached to Edison's poles)[4] to remove their overhead facilities along Telegraph Road and replace them with underground facilities at the utilities' sole expense. (Ordinance No. 00-344, 116a-23a). The City issued a press release, announcing the adoption of the new Ordinance and confirming that the new Ordinance was intended to improve Telegraph Road's appearance.

> "In addition to the infrastructure improvements, the city has instructed utility providers to bury their lines underground in an effort to improve the road's appearance.
>
> "The finishing touches will be new sidewalks and landscaping, irrigation systems, decorative street lighting and possibly some public works of art.
>
> * * *
>
> "Telegraph Tomorrow now is using Taylor's improvements as a prototype for how the road should look in the future.
>
> "Burying the utility lines is expected to go a long way in improving the appearance of the road, but it is expensive." (126a-127a; emphasis added).

Section 3 of Ordinance No. 00-344 relevantly provides:

> "Relocation Directed. Upon the adoption of this Ordinance and upon written notice from the City, all public utilities, telecommunications providers, cable television providers (collectively the "Companies"), state and county agencies ("Agencies") and all other individuals, firms, partnerships, associations, companies, corporations or entities ("Persons") who own, lease, operate and/or maintain overhead lines and wires, poles and/or related overhead facilities equipment [sic] located along, across, over and/or adjacent to Telegraph, Telegraph intersections and to private property adjacent to Telegraph, are hereby directed and ordered to begin immediately to relocate underground all

[4] There are over 100 attaching parties (e.g., cable and telephone companies) and nearly 4 million attachments on Edison's poles.

> of their overhead lines and wires and remove all poles and related overhead facilities equipment at their sole cost and expense and at no cost or expense to the City." (119a).

The City's new Ordinance directly countermanded an existing Ordinance, No. 68-8, Art V, § 501 (17a), enacted by the City in 1969. The 1969 City Ordinance, which is still effective, provides that electric lines along major thoroughfares (such as Telegraph Road) are exempt from the City's underground installation requirements, and properly defers to the "standards of construction approved by the Michigan Public Service Commission." Edison followed the City's1969 Ordinance for more than 30 years, installing and maintaining overhead lines along Telegraph Road and other major thoroughfares in the City. That long-standing City Ordinance provides:

> "Requirements for underground wiring. The proprietor shall make arrangements for all lines for telephone, electric, television and other similar services distributed by wire or cable to be placed underground entirely throughout a subdivided area, **except for major thorofare [sic] right-of-way**, and such conduits or cables shall be placed within private easements provided to such service companies by the developer or within dedicated public ways, provided only that overhead lines may be permitted upon written recommendation of the city engineer, planner, planning commission, and the approval of the city council at the time of final plat approval where it is determined that overhead lines will not constitute a detriment to the health, safety, general welfare, plat design and character of the subdivision. All such facilities placed in dedicated public ways shall be planned so as not to conflict with other underground utilities. **All such facilities shall be constructed in accordance with standards of construction approved by the Michigan Public Service Commission**." (17a; emphasis added).

On June 26, 2002, the City filed a Complaint for Declaratory Judgment against Edison in the Wayne County Circuit Court, claiming that Edison was responsible for the entire cost to remove its existing poles and overhead equipment, and for their underground replacement along the four miles of Telegraph Road. Edison moved for summary disposition, citing the MPSC's rules and approved

tariff provisions requiring the City to pay those costs, and the MPSC's primary jurisdiction to decide the parties' dispute. The City filed a cross motion for summary disposition.

On September 13, 2002, the Wayne County Circuit Court heard the motions for summary disposition. On November 25, 2002, the Circuit Court issued an Opinion denying Edison's motion and granting the City's motion (130a-39a). The Circuit Court opined that the MPSC did not have primary jurisdiction, reasoning that the case did not involve the interpretation and application of the MPSC's rules, but only whether the City's new Ordinance was valid and applicable (136a-37a). The Court held that the City's new Ordinance was valid based on Const 1963, art 7, § 29, which reserves municipalities "reasonable control" of the streets, and requires utilities to obtain a "franchise" from a municipality. The Court stated "surely the power to determine who should pay the costs of relocation is included within the right to grant a franchise." (138a).[5]

The City moved for entry of an order in accordance with the Court's opinion. Edison opposed the motion, explaining, among other things, that Edison was never provided with the final construction plans for the City's underground conduit, nor given the opportunity to review the construction when it was underway. Edison also sought the Court's permission to file an answer to the complaint, and requested discovery on the issues that were in dispute regarding the conduit reconstruction cost (1/17/03 T, pp 7-8, 145a-46a). Circuit Court denied Edison's request to file an answer, stating that the only issue remaining was the dollar amount to insert in the judgment, and that the Court would decide that matter strictly on its review of a single deposition that the Court would allow Edison to take of the City's project engineer (Id., pp 16-17, 154a-55a).

[5] The Court's assertions about unstated, self-executing constitutional authority and the specific character of the City's "franchise" authority were unfounded and incorrect, as further explained in the Arguments below.

On June 2, 2003, the Circuit Court issued an Order in accordance with its Opinion, requiring Edison to comply with City Ordinance No. 00-344 and bear the more than $14.5 million expense for the 4 miles of underground replacement in the City (173a-75a).[6] On August 19, 2003, the Circuit Court issued an Opinion and Order Denying Edison's Motion for Reconsideration (176a-79a).

On September 14, 2004, the Court of Appeals affirmed the Circuit Court's primary holdings, but remanded for further proceedings on whether Edison must pay for the City's defective conduit. City of Taylor v Detroit Edison Co, 263 Mich App 551; 689 NW2d 482 (2004), lv granted, 474 Mich 877 (2005) (183a-98a). Edison sought reconsideration on October 5, 2004, which the Court denied on October 28, 2004 (199a).

This Court granted leave to appeal, directing the parties to address the scope of the City's constitutional authority to exercise "reasonable control" of the streets, as well as the limits of that authority in view of the MPSC's "broad jurisdiction" (200a). Edison responds that the City's "reasonable control" is limited to matters of local concern, and must yield to state control of statewide interests. The MPSC has exercised controlling, statewide regulation over the underground replacement of utility facilities. The MPSC's orders, rules and tariffs all require that the expense of underground replacement must be borne by the entity that requests the removal of overhead facilities and their replacement with underground facilities. The City cannot lawfully shift these costs to Edison and its 2.1 million ratepayers.

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[6] Simply relocating electric lines from pole to pole is far simpler and less expensive than removing an overhead system and installing replacement electric lines in underground conduit. Edison submitted affidavits demonstrating that the underground conduit installed by the City involved safety violations and did not comply with technical specifications; Affidavits of Robert P. Petroff, Peter J. Bean, and Gary L. Fauser, 160a-70a, 180a-82a). The Court ordered Edison to reimburse the City over $2.5 million for underground conduit that the City installed improperly (174a). In addition, Edison must spend over $5 million to rebuild portions of the conduit that the City installed improperly, and spend an additional $7 million to replace the four miles of existing overhead utility facilities with underground lines(Affidavit of Gary L. Fauser, ¶5, 181a).

STANDARD OF REVIEW

This appeal concerns issues of constitutional and statutory construction, which are subject to review de novo. Wayne County v Hathcock, 471 Mich 445, 455; 684 NW2d 765 (2004). The same standard applies to other issues of law. Cardinal Mooney High School v Michigan High School Athletic Ass'n, 437 Mich 75, 80; 467 NW2d 21 (1991). In Hathcock, supra, this Court explained:

> "The primary objective in interpreting a constitutional provision is to determine the text's original meaning to the ratifiers, the people, at the time of ratification. This rule of "common understanding" has been described by Justice Cooley in this way:
>
> "'A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. "For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed."'
>
> "In short, the primary objective of constitutional interpretation is to realize the intent of the people by whom and for whom the constitution was ratified." 471 Mich at 468 (footnotes omitted).

This appeal arises from cross-motions for summary disposition, which is likewise subject to review de novo. Straus v Governor, 459 Mich 526, 533; 592 NW2d 53 (1999). In reviewing a motion for summary disposition pursuant to MCR 2.116(C)(10), the Court considers the pleadings, affidavits and other documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the non-moving party. Smith v Globe Life Ins Co, 460 Mich 446, 454; 597 NW2d 28 (1999).

ARGUMENT

I. THE CITY'S "REASONABLE CONTROL" OF THE STREETS "RESERVED" BY CONST 1963, ART 7, §29, IS LIMITED TO MATTERS OF LOCAL CONCERN, AND MUST YIELD TO STATE CONTROL OVER MATTERS OF STATEWIDE CONCERN.

A. The City's "Reasonable Control" of the Streets is Limited to Matters of Local Concern.

Const 1963, art 7, § 29 states:

> "No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government." (emphasis added).

Const 1963, art 7, §29 contains three (3) clauses that address different aspects of municipal regulation of utilities: (1) the "consent" clause provides that a utility needs municipal "consent" to install its facilities in public streets; (2) the "franchise" clause states that a utility needs a municipal "franchise" to "transact local business" within the municipality; and (3) the "reasonable control" clause "reserves" the municipality's "reasonable control" of the streets.

The lower courts confused these three clauses. This case does not concern "consent" to use the right-of-way along Telegraph Road for its facilities, or a "franchise" to provide electricity in the City. Edison already obtained both a prior consent and a franchise from the City or its predecessors decades ago. Edison installed its overhead lines in accordance with (1) a city ordinance enacted in 1969 that is still effective (17a), and (2) state and local franchises dating back prior to 1905 (e.g.,

13a-16a). The issue here is whether the "reasonable control" that is "reserved" to the City allows the City to shift the cost of underground replacement to Edison and its 2.1 million ratepayers across southeastern Michigan.

Const 1963, art 7, § 29 largely restated its predecessor, Const 1908, art 8, § 28, but added the phrase "Except as otherwise provided in this constitution" to the "reasonable control" clause (further discussed below). See generally, Jones v Ypsilanti, 26 Mich App 574, 579; 182 NW2d 795 (1971). When the 1908 Constitution was young, this Court explained that "reasonable control" means limited control over local matters that must yield to state authority:

> "In the study of section 28, it is interesting to notice what the committee on submission and address to the people said with reference thereto, in submitting the proposed revision to the people (page 1433, vol. 2, Proceedings and Debates of the Constitutional Convention):
>
> "'This is a new section, and its purpose is to prevent the use of streets, alleys, highways, and public places without the consent of the local authorities first had and obtained. The word "reasonable" was inserted to place a limitation upon the authority cities, villages and townships may exercise over the streets, alleys, highways, and public places within the corporate limits. And it was pointed out in the debates that without the word "reasonable," or a similar qualification, the section would practically deprive the state itself of authority over its highways and public places.'
>
> "From this, and also from reading the debates with reference to the insertion of the word 'reasonable,' it is clear that it was not the intention of the framers of the Constitution to deprive absolutely the state itself of control over its highways and bridges in the cities, villages, and townships."
>
> * * *
>
> In other words, the municipality retains **reasonable control** of its highways, which is such control as cannot be said to be unreasonable and inconsistent with regulations which have been established, or may be established, by the state itself with reference thereto. This construction allows a municipality to recognize local and peculiar conditions, and to pass ordinances, regulating traffic on its streets,

> which do not contravene the state laws." People v McGraw, 184 Mich 233, 237-38; 150 NW 836 (1915) (bold emphasis in original, underlined emphasis added).

Four years later, this Court again addressed the "reasonable control" clause, holding that a city ordinance purporting to regulate gas rates was not properly related to a city's "reasonable control" of its streets. Kalamazoo v Titus, 208 Mich 252, 266; 175 NW 480 (1919). The Court explained that some cities mistakenly believed they had greatly enlarged powers, but corrected that misunderstanding with a statement that applies equally to the City's present assertions of broad "home rule" powers:

> "Political experiment had not yet produced in this state the autonomous city - - a little state within the state. We have a system of state government, and the right of local self-government is, and always has been, a part of the system." 208 Mich at 261.

In addressing constitutional provisions, including the predecessor to the "reasonable control" clause that this Court now considers, the Kalamazoo Court further explained:

> "With regard to the subject we are considering, the impressive thing about these constitutional provisions is that they recognize and affirm the theory that cities owe their origin and their powers to the Legislature. And while cities may refer power to do some things, as, for example, power to acquire certain public works, directly to some of these constitutional provisions, it must be admitted that all of these provisions should be considered with reference to the fact that legislative power is vested in the Legislature, and that the Constitution recognizes, as former Constitutions have recognized, the general control of the Legislature over cities."
>
> * * *
>
> "We might go further and point out, what is true, that power to regulate rates of public utility companies is not a power necessary to local self-government, denial of which, or interference with the exercise of which by the Legislature, would be interference with local self-control." 208 Mich at 265 (emphasis added).

This Court has long held this narrow view of cities' "reasonable control" of the use of streets by public utilities. In Detroit, Wyandotte & Trenton Transit Co v Detroit, 260 Mich 124; 244 NW 424 (1932), the city attempted to prohibit the operation of jitneys (small buses following regular routes) within the city limits, citing the "reasonable control" clause, although the jitneys were subject to the statutory jurisdiction of the Michigan Public Utilities Commission. According to the Court:

> "[T]he enactment of the statutes had the effect of withdrawing from the city all authority over carriers covered by them, except such power as is strictly referable to reasonable control of the streets or as is reserved to it by law." 260 Mich at 128.

See also, City of Niles v Michigan Gas & Electric Co, 273 Mich 255, 264; 262 NW 900 (1935) (explaining that any implied authority of municipalities under Const 1908, art 8, §28 to "fix or contract for [utility] rates is inoperative when the Legislature exercises its reserved governmental power over them").[7]

This Court also held in North Star Line v Grand Rapids, 259 Mich 654, 664; 244 NW 192 (1932) that a city's "reasonable control" of the streets only extends to the city's territorial limits, in order to prevent interference with other municipalities' reasonable control of the streets. Otherwise, utility service could become prohibitively expensive, and not even be available to some persons and locations.

This Court again construed the "reasonable control" clause in Dearborn v Michigan Turnpike Authority, 344 Mich 37; 73 NW2d 544 (1955), stating in relevant part:

> "The right to reasonable control of their streets is not a gift of an arbitrary prerogative to the cities, villages and townships. The reasonableness of the city's control of its streets is not to be within the

[7] The 19th Century system of piecemeal utility regulation by municipalities has been universally replaced in this county by state regulatory commissions, due to economic realities and technological advances. See generally, Garfield and Lovejoy, Public Utility Economics (Prentice-Hall, 1964), p 31 ("Effective regulation requires the jurisdiction of the regulatory authority to be coextensive with the area served by the utilities regulated").

> final determination by the city in all cases, for that in practical effect could erase the word 'reasonable' from the constitutional provision. The reasonableness may be determined in accordance with the State legislature's interpretation in some instances provided that such interpretation can be approved by the court." 344 Mich at 53 (emphasis added, quoting Allen v Ziegler, 338 Mich 407, 415-16; 61 NW2d 625 (1953).

In Dooley v Detroit, 370 Mich 194; 121 NW2d 724 (1963), this Court further explained that a city's powers over public utilities are limited to those "essential to local self-government":

> "The point here made is that under our constitution and our home rule cities act, cities may exercise substantially greater powers essential to local self-government than they previously were allowed to exercise. That such powers are not without limit is, of course, conceded. Thus, cities may not, absent express legislative grant, exercise rate making powers over public utilities, - - powers not essential, or directly related to the operations of local government. [Kalamazoo, supra . . .] properly stands for the proposition that home rule cities do not possess plenary powers and may not, absent legislative grant, assume powers not essential to local self-government," 370 Mich at 210, (emphasis added).

The 1963 Constitution further emphasized the limited authority "reserved" to municipalities under the "reasonable control" clause by adding the introductory phrase: "Except as otherwise provided in this constitution." Const 1963, art 7, §29 (emphasis added). The added language reflected this Court's earlier decisions, narrowly limiting the scope of the "reserved" authority to the municipality's local concerns, and making it subject to state laws. These same limits on municipal authority are repeated in Const 1963, art 7, §22, which relevantly states:

> " . . . Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law." (emphasis added).

In Wayne County Board of Commissioners v Wayne County Airport Authority, 253 Mich App 114; 658 NW2d 804 (2002), the Court of Appeals recently reconfirmed that a municipality's "reasonable control" of the streets is limited to matters of local concern, and subject to state law:

> "Earlier cases from this Court have interpreted the 'reasonable control' phrase in this constitutional provision and have determined that the control exercised by local units of government is limited and not exclusive.
>
> * * *
>
> "Likewise, here the county retains reasonable control over its roads and public places. That control, however, is not exclusive and must give way to matters of statewide concern . . . ." 253 Mich App at 178-179 (emphasis added).

The Court of Appeals also recently reviewed the "reasonable control" clause in TCG Detroit v Dearborn, 261 Mich App 69; 680 NW2d 24 (2004). After recounting this Court's long-standing application of that clause in the cases cited above, including this Court's opinion in Detroit, Wyandotte & Trenton Transit Co, supra, 260 Mich at 128, the Court in TCG Detroit explained that a city's "reasonable control" of the streets is (1) limited by the State's exercise of authority; and (2) must be exercised by contract with a utility and not by unilateral imposition of terms:

> "Thus, under the reasonable control clause [of Const 1963, art 7, § 29], where the state occupies the field, the city loses all power except as is 'strictly referable' to the reasonable control of the streets." 261 Mich App at 91.
>
> "However, this implied [municipal] power is exercised by entering into contracts with providers [utilities], not by unilaterally imposing the terms of the grant of consent. The latter would constitute an attempt to exercise a state legislative function. Further, the implied power to contract is subject to the superior legislative powers of the state." 261 Mich App at 94-95.

Thus, this Court and the Court of Appeals have consistently held: (1) the "reasonable control" of the streets "reserved" to municipalities under Michigan's Constitution is limited to matters that are directly referable to the municipality's local concerns, (2) the municipality's local control of the streets must yield to statewide concerns, and (3) the municipality's control of the streets must be exercised by contract with the utilities, not by unilateral imposition of obligations.

In this case, the Court of Appeals' two paragraph discussion of "reasonable control" cited TCG Detroit, acknowledging: "Where the state occupies the field, the right to reasonable control is subject to the paramount authority of the state, except as to matters that are strictly referable to the reasonable control of the streets." 263 Mich App at 557 (189a). The Court of Appeals avoided the required analysis, however, by asserting: "Here, the state has not purported to occupy the field regarding a municipality's authority over the location of power lines or the allocation of costs." 263 Mich App at 557 (189a). It is difficult to understand how the Court of Appeals reached this conclusion, since the state has occupied the field through (1) multiple statutes (discussed below) authorizing the MPSC to regulate public utilities, and (2) the MPSC's exercise of that authorization by adopting specific Rules and Tariff provisions that comprehensively govern the replacement of overhead lines with underground facilities, including specific provisions controlling who pays for such replacements. Moreover, as explained below in Argument IV, the State has further occupied the field and empowered the MPSC through at least three statutes that require municipalities to pursue their disputes regarding utility practices in proceedings before the MPSC. Since the Court of Appeals found TCG Detroit (and this Court's prior opinions on which TCG Detroit relied) inapposite, it expressed no opinion on what result the Court would reach if it had found that the State occupied the field (Id, n 2, 189a).

The City's Ordinance No. 00-344 is not "strictly referable" to the "reasonable control" of the portion of Telegraph Road that passes through the City. The City hurriedly enacted the new Ordinance in direct response to Edison's letter advising the City that the MPSC's Rules required the City to pay the costs of its requested underground replacement of facilities. The Ordinance was designed to circumvent the MPSC's Rules, forcing Edison (and ultimately its customers) to pay for the City's beautification project. In other words, the Ordinance was not strictly necessary to

effectuate the City's "reasonable control" of the streets, but was simply an attempt to shift the underground replacement costs from the City to the utilities.

Even if the City could demonstrate that the new Ordinance was "strictly referable" to its reasonable control of the streets (which it cannot), the City still cannot unilaterally impose the costs of underground replacement on Edison and its ratepayers. TCG Detroit, supra. The City violated this prohibition by unilaterally adopting an ordinance that contradicted the payment obligations set by the MPSC's Rules and Tariff provisions. Pursuant to TCG Detroit, the City was instead required to enter into a bi-lateral contract with Edison, which the City admittedly does not have in this case.

The Court of Appeals relied (263 Mich App at 557, 189a) on only one other case in its discussion of the "reasonable control" clause. Detroit Edison v Richmond Twp, 150 Mich App 40; 388 NW2d 296 (1986). The Court of Appeals' reliance on Richmond Twp was completely misplaced because that case recognized that 1909 PA 106, the Transmission of Electricity Through Highways Act, MCL 460.551 et seq (further quoted and discussed below) granted the MPSC specific powers to regulate the transmission of electricity within and along public streets. 150 Mich App at 49. In Richmond Twp, the Court of Appeals affirmed summary disposition in favor of Edison, explaining that the "express legislative grant of power to the [public service] commission to control the transmission of electricity in, on, or through the public highways, streets and places precludes a township from passing ordinances regarding the same subject matter." 150 Mich App at 50 (emphasis added).

B. The City's "Reasonable Control" Of the Streets Yields to Matters of Statewide Interest, Including the MPSC's Regulation of Public Utility Rates, Terms and Conditions of Service.

The Michigan Constitution is not self-executing. The Legislature must provide for the enforcement of constitutional provisions by appropriate legislation. See generally, Bay City v State

Board of Tax Administration, 292 Mich 241; 290 NW2d 395 (1940). The Legislature has not granted municipalities the express authority to control the underground replacement of overhead utility facilities. Instead, through 1909 PA 106, MCL 460.551 et seq (the Transmission of Electricity Through Highways Act, adopted the year after the original Constitutional provision now embodied in art 7, § 29 was added to the 1908 Constitution), the Legislature expressly provided that public utilities "shall" have the right to use streets to transmit and supply electricity, with municipal consent, and reserving a municipality's "reasonable control" to matters of "mere local concern." MCL 460.553. See also, MCL 247.183(1) (similarly permitting public utilities to construct and maintain their lines over and along public roads, provided only that the public utility "shall first obtain the consent of the governing body of the city." (emphasis added).[8]

Edison duly obtained consent, and lawfully constructed its overhead lines along Telegraph Road in the City in accordance with the statutory (and thus Constitutional) scheme. The City expressly consented to overhead lines along Telegraph Road (a "major thoroughfare") in Ordinance No. 68-8, Art. V, § 501, enacted in 1969 and still effective today (17a). Nothing in the Michigan Constitution, statutes (including MCL 460.553 and MCL 247.183), or Ordinance No. 68-8 allows the City, after consenting to overhead electric lines, to later require that they be removed and replaced with underground facilities at Edison's expense.

The MPSC's jurisdiction and authority to regulate public utilities is set forth, in part, in MCL 460.6(1), which provides:

> "The public service commission is vested with complete power and jurisdiction to regulate all public utilities in the state except a

[8]Telegraph Road is a state trunk line highway under the jurisdiction of the State Highway Commission. MCL 247.651; Van Wormer v Kramer Bros Freight Lines, 284 Mich 76, 80; 278 NW 770 (1938). Utilities are permitted to construct their facilities along any state trunk line highway conditioned only on the requirement that "the consent of the State Highway Commissioner shall be obtained before the work of such construction shall be commenced." MCL 247.184.

> municipally owned utility, the owner of a renewable resource power production facility as provided in section 6d, and except as otherwise restricted by law. The public service commission is vested with the power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of such public utilities. The public service commission is further granted the power and jurisdiction to hear and pass upon all matters pertaining to, necessary, or incident to the regulation of all public utilities, including electric light and power companies, whether private, corporate, or cooperative, gas companies, water, telephone, telegraph, oil, gas, and pipeline companies, motor carriers, and all public transportation and communication agencies other than railroads and railroad companies." (emphasis added).

In Travelers Ins Co v Detroit Edison Co, 465 Mich 185; 631 NW2d 733 (2001), this Court discussed the wide breadth of the Commission's jurisdiction to regulate public utilities:

> "It is clear from reading the enabling statute of the MPSC that the agency's jurisdiction extends well beyond the Valentine v [Michigan Bell Telephone Co, 388 Mich 19; 199 NW2d 182 (1972)] Court's purported restriction. For example, MCL 460.6 vests in the MPSC the 'power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of such public utilities.' Pursuant to MCL 460.6, the MPSC is also 'granted the power and jurisdiction to hear and pass upon all matters pertaining to, necessary, or incident to the regulation of all public utilities. . . .'" 465 Mich at 202, n 17.

Immediately following the adoption of the "reasonable control" language in the 1908 Constitution, the Legislature enacted the Transmission of Electricity Through Highways Act, 1909 PA 106, MCL 460.551 et seq. Section 1 of that Act sets forth the State's broad control over rates, terms and conditions of electric transmission on, through or along streets.[9] Section 2 provides that

[9] MCL 460.551 states: "When electricity is generated or developed by steam, water or other power, within 1 county of this state, and transmitted and delivered to the consumer in the same or some other county, then the transmission and distribution of the same in or on the public highways, streets and places, the rate of charge to be made to the consumer for the electricity so transmitted and distributed and the rules and conditions of service under which said electricity shall be transmitted and distributed shall be subject to regulation as in this act provided" (emphasis added).

the Michigan Public Utilities Commission (later replaced by the MPSC under MCL 460.4) "shall have control and supervision of the business of transmitting and supplying electricity," including control over utility rates and tariffs.[10] Section 3 states that utilities "shall" have the right to use streets, with municipal consent, and reserves a municipality's "reasonable control" only to matters of "mere local concern". The Act also grants the MPSC authority to control the specifications for electric lines and facilities in streets. MCL 460.554; MCL 460.555; MCL 460.556. The MPSC's authority to fix utility rates and tariffs is set forth, among other places, in MCL 460.557.

The MPSC has fully considered and regulated the subject of this case through rules and tariffs issued pursuant to its authorizing statutes. Pursuant to its statutory authority under MCL 460.6 (quoted above) as well as MCL 460.55[11], and MCL 460.557[12], the MPSC issued an Order and

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[10] MCL 460.552 states: "The Michigan public utilities commission, hereinafter referred to as 'the commission' shall have control and supervision of the business of transmitting and supplying electricity as mentioned in the first section of this act and no public utility supplying electricity shall put into force any rate or charge for the same without first petitioning said commission for authority to initiate or put into force such rate or charge and securing the affirmative action of the commission approving said rate or charge."

[11] MCL 460.55 authorizes the MPSC to make rules to regulate utilities:

> "Said commission shall have power and authority to make, adopt and enforce rules and regulations for the conduct of its business and the proper discharge of its functions hereunder, and all persons dealing with the commission or interested in any matter or proceedings pending before it shall be bound by such rules and regulations. The commission shall also have authority to make and prescribe regulations for the conducting of the business of public utilities, subject to the jurisdiction thereof, and it shall be the duty of every corporation, joint stock company, association or individual owning, managing or operating any such utility to obey such rules and regulations."

[12] MCL 460.557 (6) relevantly states: "The Commission may promulgate rules for the conduct of its business and the proper discharge of its functions under this act. . ."

adopted MPSC Rule 460.511 through 460.519, which comprehensively govern underground electric lines (August 10, 1970 Electric Rules Order in MPSC Case No. U-3001, MPSC Rules and Regulations Governing the Extension of Underground Electric Distribution Lines, 18a-27a). The MPSC's Rules address both the initial construction of underground lines (MPSC Rules 460.511, 460.512, 460.513, 460.514, 460.515 and 460.517), as well as the specific case of the replacement of existing overhead lines with underground facilities (MPSC Rule 460.516, 27a).

In adopting those Rules, the MPSC recognized the statewide issues involved, including the rate impacts on utility customers. The MPSC carefully balanced the "wide public interest in, and public support for, a compulsory policy of undergrounding electric utility facilities," the "technology and the economies involved," and the "cost of rendering service," concluding that "it would not be reasonable to charge higher rates to the vast majority of customers served from overhead systems in order to provide underground electric facilities for the relatively few customers." (August 10, 1970 Opinion and Order in MPSC Case No. U-3001, pp 2-3, findings A-D, 19a-20a).

The City's desire to replace Edison's overhead lines with underground facilities is the exact issue that the MPSC considered in its 1970 Order adopting the Rules. The MPSC found that the party that requests and benefits from the underground replacement should bear the cost, explaining: "Those who benefit directly from the burial of electric facilities should make a contribution in aid of construction to the utility in an amount equal to the estimated difference in cost between the standard overhead facilities and the generally more aesthetic underground facilities" (20a, finding E).

The specific MPSC Rule regulating the responsibility for the costs of relocating existing electric lines underground, MPSC Rule 460.516, is entitled "**Replacement of Existing Overhead Facilities.**" This Rule directly controls the proper outcome in this case, and provides that the party

requesting the underground replacement of utility lines is required to compensate the utility for all costs of replacing the overhead facilities with underground lines:

> "Rule 6. (1) Existing overhead residential, commercial and industrial electric distribution and service lines anywhere in the state shall be replaced with underground facilities at the option of the affected customer or customers.
>
> "(2) Before construction is started, the customer shall be required to pay the utility the depreciated cost (net cost) of the existing overhead facilities plus the cost of removal less the salvage value thereof and, also, make a contribution in aid of construction in an amount equal to the estimated difference in cost between new underground and new overhead facilities, including, but not limited to, the costs of breaking and repairing streets, walks, parking lots and driveways, and of repairing lawns and replacing grass, shrubs and flowers." Rule 460.516. (27a, emphasis added).

Although all the MPSC's Rules regarding underground distribution lines were cited to the Court of Appeals, the Court's opinion acknowledged only MPSC Rule 460.517 (263 Mich App at 561, 193a),[13] which does not apply in this case. The Court failed to recognize that MPSC Rule 460.517, entitled "Underground Facilities for Convenience of Utilities or Where Required by Ordinances," governs only the initial construction of underground facilities, not the replacement of existing overhead facilities with underground facilities:

> "Rule 7. The utility shall bear the cost of construction where electric facilities are placed underground at the option of the utility for its own convenience or where underground construction is required by

[13] In rendering an opinion contrary to Rule 460.516 (but without even acknowledging that Rule's existence), the Court of Appeals violated, among other things, MCL 462.25, which provides:

> "All rates, fares, charges, classification and joint rates fixed by the commission and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie, lawful and reasonable until finally found otherwise in an action brought for the purpose pursuant to the provisions of section 26 of this act, [MCL 462.26] or until changed or modified by the commission as provided for in section 24 of this act [MCL 462.24]."

> ordinance in heavily congested business districts." Rule 460.517 (27a).

In contrast, MPSC Rule 460.516 specifically concerns the "replacement" of existing overhead lines with underground facilities, and requires the "affected customer or customers" (the City is an "affected customer" of Edison's electric utility service, which it uses, for example, to power street lights and traffic signals) to pay for the replacement.

This case also involves a Tariff that specifically governs the electric service that Edison provides to the municipalities it serves, including the City. Under the Transmission of Electricity Through Highways Act, Edison provides non-discriminatory service to all those seeking service (MCL 460.557(4)), pursuant a Tariff that controls the terms and conditions of Edison's service to the public. The Court of Appeals erred in stating that this case does not "involve utility rate structures. . .or tariffs." 264 Mich App at 555 (187a). In addition to the MPSC Rules cited above, Edison's MPSC-approved Tariff directly controls the assignment of costs for the replacement of Edison's overhead facilities with underground facilities. Specifically:

> (1) Section B-3.4(1)(f) provides that Edison "will not undertake the replacement of existing overhead lines . . . with underground installations . . . except where agreements for reimbursement are made in accordance with MPSC R-460.516" (emphasis added);
>
> (2) Section B-3.4(5)(a)(1) provides: "Where overhead lines are allowed by MPSC Rules . . . and are objected to by a person or a municipality . . . [t]he objecting party shall be responsible for the payment of the additional cost of the underground facilities" (emphasis added); and
>
> (3) Section B-3.6(3)(b)(3) excepts Edison from paying for any "necessary relocation at its own expense" when the "facilities provide public service such as lighting, traffic signals, etc." (Tariff §§ B-3.4(1)(f), B-3.4(5)(a)(1) and B-3.6(3)(b)(3), 47a, 52a, 58a).[14]

[14] The present Tariff provisions were issued pursuant to the MPSC's April 12, 1990 Settlement Agreement in Case No. U-9498 (37a-45a). That Order modified some of the Tariff provisions that

A utility provides new or replacement utility facilities to serve its customers in accordance with safety, cost and other considerations addressed in MPSC tariffs and rules. Where a utility has properly installed overhead lines that continue to provide service and need not be moved or removed, the Tariff requires that a "person or municipality" (plainly the City is a municipality) desiring to remove those facilities and replace them with underground facilities must pay the costs of this expensive and duplicative endeavor. The City's Ordinance violates the Tariff and results in rate discrimination among Edison's customers, by forcing those customers to pay for the City's required underground replacement.

The City previously attempted to support its Ordinance as an alleged exercise of police power to promote health, safety and welfare concerns. That attempt misses the mark because the City has no power, whether premised on health, safety, welfare or otherwise, to control utility rates and tariffs. Utility regulation is a matter of the State's police power. Arkansas Electric Cooperative Corp v Arkansas Public Utility Comm, 461 US 375, 377; 103 S Ct 1905; 76 L Ed 2d 1 (1983) ("the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States").[15]

Recent guidance is provided by the analogous case of City of Allen v Public Utility Comm, 161 SW2d 195 (Tex App, 2005), where the Texas Court of Appeals rejected a city's contention that

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were issued pursuant to the MPSC's July 19, 1976 Opinion and Order in Case No. U-4508 (28a-36a). Case No. U-4508 was a ratemaking proceeding that addressed charges to be paid to utilities for underground extensions. The MPSC recognized that all interested parties had a chance to participate, and further noted that "should any party to this proceeding or any other party for that matter wish to challenge the necessity for any charge for underground extensions, other forums are available including an appeal of any specific billing or participation in specific rate cases" (U-4508 Opinion and Order, p 4, 31a).

[15] The City's decision simply to have underground replacement lines is not at issue. MPSC Rule 460.516(1) and the Tariff (quoted above) permit underground replacement lines, as long as the cost causer pays for them.

its ordinances requiring underground replacement of utility facilities constituted a legitimate exercise of power to protect the health, welfare and safety of the city's citizens. The Court explained: "Under the guise of a police regulation the municipality cannot undertake to prescribe service, rates or charges containing irregularities, unjust discrimination, undue preference or advantages, contrary to state law and free from state investigation or regulation by the state commission." 161 SW2d at 209 (citing 12 McQuillan, Municipal Corporations (3d ed, 1995), § 34.146). The Court held that the city's ordinances must yield to the state's comprehensive regulation of utilities, and explained that the ordinances illegally regulated utility rates, contrary to a utility tariff, by reducing the compensation that a utility would normally recover for an underground installation to zero, and shifting that expense to the utility's customers. 161 SW2d at 206-207. See also, City of Auburn v Quest Communications, 260 F3d 1160, 1169 (CA 9, 2001) ("it would be absurd for a city to be able, by ordinance, to exempt itself from a prior tariff that was validly enacted and authorized by legislation").

II. ABSENT EXPRESS PERMISSION GRANTED BY THE MPSC, THE CITY HAS NO AUTHORITY TO SHIFT THE RESPONSIBILITY FOR UNDERGROUND REPLACEMENT COSTS FROM THE CITY TO UTILITIES.

As demonstrated above in Argument I, (1) the City's "reasonable control" of the streets is limited to matters of "local concern," (2) the rates, terms and conditions of utility service are matters of statewide concern that the Legislature delegated to the MPSC, and (3) the MPSC has adopted rules and tariff provisions making the City responsible for the costs of underground replacements. Therefore, absent express permission granted by the MPSC, the City has no authority to shift its liability for the cost of underground replacement to Edison and its ratepayers.[16]

[16] Thus, to paraphrase the issue presented by the Court, the City does not "invariably" have authority to shift the burden of underground replacement costs. Rather, the City has no authority to shift those costs, except as may be expressly permitted by the MPSC.

Edison recognizes that this position may run contrary to the "governmental/proprietary" distinction that the Court of Appeals has inconsistently applied in some earlier cases. Edison also emphasizes that, even with the MPSC's permission, the shifting of such costs to utilities could present serious violations of other constitutional rights. Therefore, Edison discusses these issues below.

A. The Court of Appeals Erred by Basing its Decision on the Flawed "Governmental" vs "Proprietary" Distinction.

The Court of Appeals stated: "On the issue of relocation costs, this Court has repeatedly articulated a general rule that relocation costs may be imposed on the utility if necessitated by the municipality's discharge of a governmental function, while the expenses must be borne by the municipality if necessitated by the discharge of a proprietary function." 263 Mich App at 557-58 (189a-90a).

All of the prior Court of Appeals cases applying this so-called "governmental/proprietary rule" involved costs of moving overhead utility facilities to different overhead locations. The Court's Opinion in this case is the first and only extension of that "rule" to the removal of overhead electric lines and their replacement with underground facilities in Michigan. Other states' courts have reached contrary conclusions. Cincinnati v Cincinnati & Suburban Bell Telephone Co, 123 Ohio St 174; 174 NE 586 (1930) (city must pay for replacement of utility lines underground); Redevelopment of Oil City v Woodring, 498 Pa 180; 445 A2d 724 (1982) (holding that city development authority's action requiring underground utility installation was a taking). See also, Rochester Telephone Corp v Village of Fairport, 84 AD2d 455; 446 NYS2d 823 (1982) (holding that it was not reasonable for municipality to order a utility to replace its existing above-ground facilities underground in

connection with a street improvement project); New York v New York Telephone Co, 278 NY 9; 14 NE2d 831 (1938).

The Court of Appeals' reliance on a so-called "governmental/proprietary rule" is unsound because that distinction has been questioned by that Court, Detroit Edison v Detroit, 180 Mich App 145, 149-50; 446 NW2d 615 (1989), by this Court, Dearden v Detroit, 403 Mich 257, 261-63; 269 NW2d 139 (1978), and by the United States Supreme Court. Indian Towing Co v United States, 350 US 61, 65; 100 L Ed 2d 48, 54-55; 76 S Ct 122 (1955) (referring to the distinction as a "quagmire," stating that "the decisions in each of the States are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound").

The governmental/proprietary distinction has produced inconsistent results and continues to be unworkable because it assumes that such a "distinction" can be drawn. In reality, the role of government continues to change, and now encompasses many matters that may have been once considered proprietary in the past. See, for example, Garcia v San Antonio Metropolitan Transit Authority, 469 US 528, 545-46; 105 S Ct 1005; 83 L Ed 2d 1016 (1985) (explaining this "fundamental problem" and rejecting the distinction as "unsound in principle and unworkable in practice"). See also, Helvering v Gerhardt, 304 US 405, 427; 58 S Ct 969; 82 L Ed 1427 (1938) (Black, J., concurring).

Other cases further demonstrate why the claimed "distinction" is unsound. Compare this road beautification case to Pontiac v Consumers Power Co, 101 Mich App 450, 453-55; 300 NW2d 594 (1981), where the City of Pontiac was required to pay the costs of relocating Consumers Power Company's ("Consumers") facilities, since the operation of a hospital was held to be a "proprietary function," and Detroit Bd of Ed v Michigan Bell Tel Co, 51 Mich App 488; 215 NW2d 704 (1974), aff'd 395 Mich 1; 232 NW2d 633 (1975), where a school board was held obligated to compensate a

utility for relocating equipment due to the expansion of school buildings. There is no intellectually-honest way to reconcile or defend a rule that requires the municipality to pay the utility replacement costs for the construction of a public hospital or school, but requires the utility to bear such costs for beautification of a public road running through the municipality.

The Court of Appeals attempted to support its decision that the City was engaging in a "governmental function" by relying on "aesthetic concerns" as a "reasonable governmental interest" "in the zoning context" (263 Mich App at 559). The Court failed to recognize that Detroit Edison, supra, 150 Mich App at 50, declared provisions of a zoning ordinance invalid as contrary to the Transmission of Electricity Through Highways Act.[17] Further, the statutory provisions governing zoning expressly prohibit ordinances that seek to remove or alter existing structures or uses, except upon payment or acquisition by the municipality. See, MCL 125.216, 125.286, and 125.583(a), expressly allowing existing buildings and uses to continue after adoption of zoning ordinances. Even the authority cited by the Court (263 Mich App at 559, 191a) expressly recognized that the zoning ordinance was valid in part because it provided that existing "signs may be maintained and repaired so as to continue the useful life of the sign." Adams Outdoor Advertising, Inc v Holland, 234 Mich App 681, 690; 600 NW2d 339 (1999), aff'd 463 Mich 675, 678, 685; 625 NW2d 377 (2001). See also, Ottawa County Farms v Polkton Twp, 131 Mich App 222, 229; 345 NW2d 672 (1983) (holding

[17] Detroit Edison involved safety matters. The parties here have also disagreed about safety and engineering matters, which are within the MPSC's specialized expertise and authority. The City has no authority to regulate and deviate from the MPSC's statewide control over such matters, any more than the City could decide to change the colors of traffic lights. See, Borough of Roselle v Public Service Electric and Gas Co, 35 NJ 358; 173 A2d 233, 241 (1961) (holding that ordinance requiring underground installation of electric power lines exceeded the borough's power, and explaining: "Were each municipality through which a power line has to pass free to impose its own ideas of how the current should be transmitted through it, nothing but chaos would result, and neither the utility nor the state agency vested with control could be assured of ability to fulfill its obligations of furnishing safe, adequate and proper service to the public in all areas.")

that municipal exercise of the police power, when based solely on aesthetic considerations, is unreasonable).

As noted in Detroit Edison, supra, 180 Mich App at 149-150, the governmental/proprietary distinction is a legislative construct under the Governmental Tort Liability Act, MCL 691.1401, et seq, and "[s]trictly speaking, the act and the cases which construe it do not apply in the context of this case." 180 Mich App at150. In another context, this Court criticized the governmental/ proprietary distinction as "largely unsatisfactory," "simplistic," "amorphous," "artificial," and "unhelpful." Dearden, supra, 403 Mich at 261-63. Therefore, the claimed distinction cannot provide a logical or rational basis for determining the outcome of this case or similar cases. This case presents an opportunity for this Court to overrule badly reasoned and unworkable precedent. Robinson v City of Detroit, 462 Mich 439, 464-65; 613 NW2d 307 (2000).

B. The City's Ordinance Also Denies Edison Due Process, Takes Edison's Property Without Compensation, and Interferes With Edison's Contracts.

In addition to the significant constitutional limitations discussed in Argument I, the City's Ordinance also violates other constitutional protections that are incorporated in Const 1963, art 7, §29 by the phrase, "Except as otherwise provided in this constitution . . ." Even if the City's Ordinance were otherwise authorized (which it is not), it would still violate Edison's substantive due process rights under the Fifth and Fourteenth Amendments to the U.S. Constitution, as well as their Michigan counterparts.[18] The City cannot force Edison (and ultimately its ratepayers) to subsidize a City improvement. As Justice Holmes observed in Pennsylvania Coal Co v Mahon, 260 US 393,

[18] The Fifth Amendment to the U.S. Constitution, applicable to the States through the Fourteenth Amendment, provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation." Const 1963, art 1, §17 provides: "No person shall be . . . deprived of life, liberty or property without due process of law." Const 1963, art 10, §2 provides: "Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law."

416; 43 S Ct 158; 67 L Ed 322 (1922), "strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

This Court explained in Gackler v Yankee Springs Twp, 427 Mich 562, 574; 398 NW2d 393 (1986) that "an ordinance requiring immediate cessation of a nonconforming use [a use established before the adoption of the ordinance] may be held to be unconstitutional because it brings about a deprivation of property rights out of proportion to the public benefit obtained." (emphasis added). The City's ordinance in this case ordered Edison to immediately remove its valuable and previously-established overhead facilities and to immediately reinstall underground lines at great expense, without any consideration for Edison's property rights. Had the Court balanced the claimed public interest obtained by requiring underground replacement against the severe deprivation of Edison's property rights, as is required under Due Process and Takings jurisprudence, it should have reached the same conclusion as the MPSC did in Case No. U-3001, namely, "it would not be reasonable to charge higher rates to the vast majority of customers served by overhead systems in order to provide underground electric facilities for the relatively few customers." (20a, finding D).

As discussed above, the Court of Appeals attempted to support its decision with a zoning analogy that does not apply here. 263 Mich App at 559 (191a). Even if zoning law were applicable, however, this Court has held in the zoning context that a property owner must be allowed, at a minimum, to amortize an existing nonconforming use for a substantial number of years before requiring its removal, in order to allow the owner a reasonable opportunity to recover its investment in the existing use. Adams Outdoor Advertising v East Lansing, 439 Mich 209; 438 NW2d 38 (1992). See also, Adams Outdoor Advertising v East Lansing, 463 Mich 17; 614 NW2d 634 (2000) (narrowly limiting affirmance of the City's ordinance with respect to removal of billboards on leased

rooftop space). In this case, the City's new Ordinance mandated Edison to immediately remove and replace its overhead lines with underground facilities at its sole cost, without any attempt to determine a reasonable amortization period. Such an immediate, arbitrary and uncompensated deprivation violates Edison's constitutional rights under both the United States and Michigan Constitutions.

Edison's status as a public utility does not deprive Edison of the constitutional protections against takings without compensation. Missouri Pacific Ry Co v Nebraska, 164 US 403, 417; 17 S Ct 130; 41 L Ed 489 (1896); Delaware, Lackawanna & Western RR Co v Morristown, 276 US 182, 195; 48 S Ct 276; 72 L Ed 523 (1929) (holding that a municipal corporation's requirement that a railroad set aside a portion of its property for a public taxi stand was an unconstitutional taking).

The Court of Appeals in this case relied heavily, but incorrectly, on Detroit Edison v Detroit, 208 Mich App 26; 527 NW2d 9 (1994). The city in that case altogether vacated the streets and alleys that were being occupied by the utilities, and did not require any utilities to be placed underground. In addition, the "public purpose" relied upon in that case expressly cited Poletown Neighborhood Council v Detroit, 410 Mich 616; 304 NW2d 455 (1981), which this Court recently overruled. Wayne County v Hathcock, 471 Mich 445; 684 NW2d 765 (2004). Accordingly, the constitutional balance between the "public interest" and the "deprivation of property" used in the prior utility cases involving the removal or relocation of overhead utility facilities should be revisited under the current (and corrected) state of the law as set forth in Hathcock.

Moreover, in Michigan, utilities occupy the public rights of way by virtue of vested property and contract rights under a state franchise granted pursuant to the Foote Act, 1905 PA 264, 1915 CL 4841. West Bloomfield Twp v Detroit Edison, unpublished opinion per curiam of the Court of Appeals, decided November 13, 2001 (Docket No. 222497). In addition, Edison holds a franchise

granted by the City's predecessor, Taylor Township, on September 11, 1939 (13a-16a), which does not reserve or condition Edison's occupation of the public rights-of-way upon any requirements regarding the underground replacement of electric lines. By substantially impairing the rights granted to Edison under its state and local public utility franchises, the City has violated the Contracts Clause of both the United States and Michigan Constitutions.[19] Southern California Gas Co v City of Santa Ana, 202 F Supp 2d 1129 (CD Cal, 2002), aff'd 336 F3d 885 (CA 9, 2003).

III. THE CITY'S ORDINANCE IS PREEMPTED BECAUSE IT IMPROPERLY REGULATES A MATTER OF STATEWIDE CONCERN THAT IS ALREADY COMPREHENSIVELY REGULATED BY THE MPSC WITHIN ITS BROAD STATUTORY AUTHORITY.

When the state and its agencies have regulated an area of state-wide concern, as the Legislature and MPSC have in this case, the law is clear that:

> "[A] municipality may not enact an ordinance that directly conflicts with the state statutory scheme or if the state statutory scheme preempts the municipality's ordinance by 'occupying the field of regulation which the municipality seeks to enter, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulation'." American Federation of State, County and Municipal Employees v City of Detroit, 468 Mich 388, 411; 662 NW2d 695 (2003) (quoting People v Llewellyn, 401 Mich 314, 322; 257 NW2d 902 (1977)). See also, Michigan Restaurant Ass'n v Marquette, 245 Mich App 63, 65-66; 626 NW2d 418 (2001).

The Legislature authorized the MPSC to regulate the replacement of overhead wires, and the MPSC has done so through specific Rules and Tariff provisions, so the City's Ordinance 00-344 is void. This legal principle is well established and has been widely recognized:

> "When a municipality attempts to interfere with the power of the commission, its ordinances and acts are void." 12 McQuillin, Municipal Corporations (3d ed, 1995), § 34.09, p 33.

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[19] US Const, art 1, §10 states: "no state shall . . . pass any . . . Law impairing the Obligation of Contracts." Const 1963, art 1, §10 similarly states: "No . . . law impairing the obligation of contract shall be enacted."

Courts have repeatedly held that ordinances are null and void where they are inconsistent with these types of public utility rules and tariffs. In the analogous case of General Telephone Co v Bothell, 105 Wash2d 579; 716 P2d 879 (1986), the court held that city ordinances requiring the underground replacement of utility facilities at the utilities' expense were "null and void" because they contradicted a tariff and regulation that required the party requesting the underground replacement to bear that expense. The Court stated:

> ". . . Furthermore, a city's right to enact police power regulations in a given area ceases when the [Washington Public Service Commission] passes a general law concerning the same area and concurrent jurisdiction is not possible. General's undergrounding tariff was valid and pursuant to express [Washington Public Service Commission] authority. Concurrent jurisdiction is not possible since General's tariff conflicts with Bothell's subsequently enacted ordinances. Such conflicts generally are resolved in favor of the public service commission.
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> * * *
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> "The [Washington Public Service Commission] has authority to adopt regulations regarding the rates, services, facilities and practices of telephone companies. It adopted a valid regulation regarding facilities and practices of such companies, and General filed a tariff in response to that regulation, which became law. Whether seen as contractual or police power exercises, Bothell's subsequent ordinances do not have the authority to preempt that tariff. Those portions of the Bothell and Redmond ordinances that conflict with General's tariff are thus rendered null and void." 716 P2d at 884.

Accord, Public Service Co v Town of Hampton, 120 NH 68; 411 A2d 164 (1980); Union Electric Co v City of Crestwood, 499 SW2d 480, 483 (Mo, 1973); Duquesne Light Co v Upper St. Clair Twp, 377 Pa 323; 105 A2d 287 (1954); Vandehei Developers v Public Service Comm, 790 P2d 1282, 1286 (Wyo, 1990); Florida Power Corp v Seminole County, 579 So2d 105 (Fla, 1991).

The Court of Appeals erred in holding that Ordinance 00-344 is not preempted (264 Mich App at 560-62, 192a-94a) because the Court overlooked the statutes discussed above, which expressly grant the MPSC broad authority to regulate utility facilities. The Court of Appeals also

mistakenly concluded that the "MPSC's jurisdiction is not pervasive enough to support total preemption." 263 Mich App at 562 (194a). Perhaps most importantly, the Court erred when it ignored the MPSC's Rules and Tariff No. 9. Instead, the Court incorrectly asserted that: "The MPSC's own rules contemplate that municipalities will pass ordinances requiring that lines be placed underground." 263 Mich App at 561, 193a, citing MPSC Rule 460.517. The Court's reliance on MPSC Rule 460.517 was misplaced because that rule concerns the costs of initial construction, not replacement, as explained above. Further, MPSC Tariff No. 9, Sections B-3.4(1)(f) and B-3.4(5)(a)(1), which are directly on point here, expressly contemplate that a municipally may require working overhead lines to be removed and replaced with underground lines, but also expressly require the municipality to pay for the costs of that underground replacement (47a, 52a). The City's new Ordinance contradicts the MPSC's rules and Tariff provisions, so that Ordinance is preempted by State law and is invalid.

The Court of Appeals also erred when it mistakenly asserted that state regulation is not necessary to achieve uniformity, and that the Michigan courts have decided this type of case before. Edison discusses the need for uniformity in detail with respect to the primary jurisdiction doctrine in Argument IV below, and incorporates that discussion here. It also bears repeating that the Court of Appeals ignored Richmond Twp, supra, 150 Mich App at 49-51, which held that a municipality's attempted regulation of electric utility lines was invalid because it conflicted with the MPSC's jurisdiction and authority:

> "This express legislative grant of power to the commission to control the transmission of electricity in, on, or through the public highways, streets and places precludes a township from passing ordinances regarding the same subject matter." 150 Mich App at 50.

The discussion above regarding the limits of reasonable control reflects that Michigan is not, and cannot be, a patchwork of city-states. Municipal control over local concerns must yield to state control of state concerns such as the rates, terms and conditions of utility service. Further guidance is provided by Brimmer v Elk Rapids, 365 Mich 6; 112 NW2d 222 (1961),[20] where a village attempted to amend its charter to eliminate general statutory restrictions on sewer assessments. In holding that the village had exceeded its constitutionally-reserved powers, this Court determined that the levy of sewer assessments was a matter of general, statewide concern, rather than a matter of purely local concern. The Court framed the issue as:

> "[W]hether the [statutory] limitations and attempted charter amendments with respect thereto, relate to matters of strictly municipal concerns as to which certain powers reside in the electors to govern by charter provision and amendment, or are of State-wide interest subject to general laws of the State, and, specifically, whether the [statutory] limitations are general laws of the State to which village charters and amendments are subject." 365 Mich at 14.

The Court found that statewide concerns relating to the levy of sewer assessments outweighed the local concerns, and notably relied on prior cases that similarly found public utility regulation to be a matter of statewide, and not local concern:

> ". . . [A]ttention should be directed to cases . . . holding invalid city charter provisions and ordinances for fixing utility rates, which power, by State law, is conferred upon the Michigan public service commission." 365 Mich at 6.

Brimmer involved a municipality's illegal attempt to avoid a state limit on special assessments. The City's Ordinance in this case is even more egregious. Consider that the four mile stretch of Telegraph Road where the City ordered underground replacement of utility lines is analogous to a special assessment district in the sense that it receives a benefit (see, for example,

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[20]Brimmer discussed the predecessor of Const 1963, art 7, § 22, which was former Const 1908, art 8, §21.

171a, reflecting an economic benefit from $76 million of investment along Telegraph Road in the City).[21] Unlike a special assessment district, however, the City and its residents who receive the benefit here are attempting to avoid paying for it. The City's ordinance is analogous to setting a special assessment at zero, and attempting to make others outside of the district pay instead. Neither Edison nor the vast majority of its customers will realize any benefit from the underground replacement of utility lines in the City, so the City's attempt to shift costs to them is inequitable as well as illegal. See also, Arrowhead Development Co v Livingston Co Rd Comm, 413 Mich 505, 519; 322 NW2d 702 (1982) ("Apart from the constitutionality of the proposed exaction in this case, a question we neither reach nor decide, it is clear that it would be impermissible to impose the entire cost of an improvement on a single subdivision developer where other persons or property would be specifically benefited").

In summary, the Legislature has granted broad, statewide authority over utility rates and facilities to the MPSC. Pursuant to its rulemaking authority, the MPSC has comprehensively regulated the cost responsibility for the underground replacement of existing overhead facilities. The MPSC's rules and Tariff No. 9 require the City to pay for its requested replacement of lines underground. The City's Ordinance purporting to shift these costs to Edison directly conflicts with this statewide scheme of regulation, so the Ordinance is preempted.

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[21] From a broader perspective, it is debatable whether there is any overall "benefit" from underground versus overhead utility facilities. See generally, City of Allen, supra, 161 SW3d at 204-205 (discussing considerations beyond aesthetics and costs, including underground facilities presenting service issues because they are more susceptible to damage from construction and take more time and effort to repair, compared to overhead facilities).

IV. TO THE EXTENT THAT ANY ISSUES REMAIN AFTER THIS COURT ADDRESSES THIS CASE, THE MPSC MUST INITIALLY DECIDE THOSE ISSUES.

The Court's three issues regarding the City's "reasonable control" of the streets, the limits on that "reasonable control," and reconciling that "reasonable control" with the MPSC's broad authority to regulate utilities, are discussed above. In summary, (1) the City has reasonable control only over local matters, (2) the City must yield to state control of statewide matters such as the cost allocation for the underground replacement of overhead electric lines, and (3) the City may not shift its replacement costs to utilities unless the MPSC expressly allows it to do so.

When cases arise within the MPSC's regulatory scheme, the MPSC must initially decide them. If the Court's opinion does not resolve all the outstanding issues, it would be appropriate to remand this case to the MPSC to resolve any remaining issues. Dominion Reserves, Inc v Michigan Consolidated Gas Co, 240 Mich App 216, 222; 610 NW2d 282 (2000), lv den 465 Mich 889 (2001) (reversing circuit court's summary disposition order, and referring the case to the MPSC); Williams Pipe Line Co v Empire Gas Corp, 76 F3d 1491, 1498 (CA 10,1996) (remanding with instructions for the district court to vacate its judgment invalidating a tariff provision, and refer the matter to the Federal Energy Regulatory Commission).

A. The Lower Courts Were Required to Defer to the MPSC Under the Primary Jurisdiction Doctrine.

The outcome of this case is governed by MPSC rules and tariffs governing the detailed rates, terms and conditions for the provision of electricity. This Court recently clarified and reaffirmed the primary jurisdiction doctrine in a case governed by Edison's MPSC steam tariff. Travelers, supra (reversing the Court of Appeals, and reinstating the Circuit Court's decision to defer the case to the MPSC for a decision in accordance with the applicable tariff). Primary jurisdiction is not just a

compelling consideration – it is a requirement in cases such as this. Rinaldo's Const Corp v Michigan Bell Telephone Co, 454 Mich 65, 67; 559 NW2d 647 (1997) ("we hold that . . . the doctrine of primary jurisdiction requires dismissal of plaintiff's claim because it arises solely out of the contractual relationship between the telephone company and the plaintiff, its customer, and is limited by Tariff 7").

Courts may not decide the jurisdictional question based on a plaintiff's mere allegations. Rinaldo's, supra, 454 Mich at 82. Accordingly, this Court and the Court of Appeals have looked beyond various plaintiffs' allegations, and recognized issues of public utility regulation that must be decided by the MPSC in a broad array of circumstances, including:

a. Claims that a common purchaser breached a contract to purchase natural gas from a gas producer. North Michigan Land & Oil Co v Michigan Consolidated Gas Co, Court of Appeals Order in Case No. 223319 (March 27, 2000), lv den 465 Mich 949 (2002); and Michigan Consolidated Gas Co v Savoy Oil & Gas, Inc, Court of Appeals Order in Case No. 230669 (January 2, 2001), lv den 465 Mich 896 (2001).

b. Claims that a natural gas common carrier breached a contract to transport gas through a pipeline. Dominion, supra, 240 Mich App 26; and JAF Properties, Inc v Public Service Comm, unpublished opinion of the Court of Appeals, decided December 3, 1999 (Docket No. 209405), lv den 462 Mich 870 (2000).

c. Claims involving "all public utilities and their rates and conditions of service," including the approval of a utility's "performance standards." Attorney General v Public Service Comm, 249 Mich App 424, 434-35; 642 NW2d 691 (2002).

d. Claims against a utility for breach of contract, breach of warranty, negligence and fraud arising from power surges causing damage to commercial appliances. Durcon Co v Detroit Edison Co, 250 Mich App 553; 655 NW2d 304 (2002). See also, Farm Bureau General Insurance Co v Detroit Edison Co, unpublished opinion of the Court of Appeals, decided October 26, 2004 (Docket No. 248576).

e. Negligence claims against both a utility and its independent contractor involving the maintenance and inspection of power lines. Baker v Detroit Edison Co, unpublished opinion of the Court of Appeals, decided September 9, 2004 (Docket No. 246401); and Church Mutual Insurance Co v Consumers Energy Co, unpublished opinion of the Court of Appeals, decided October 30, 2003 (Docket No. 240571).

f. Claims involving inaccurate customer billings and defective meters. Ano-Tech, Inc v Michigan Consolidated Gas Co, unpublished opinion of the Court of Appeals, decided May 25, 2004 (Docket No. 245355).

g. Breach of contract and tortious interference claims arising from an electric company's refusal to provide electric service to certain sites and facilities. Ameritech Mich v Detroit Edison Co, unpublished opinion of the Court of Appeals, decided January 7, 2004 (Docket No. 237856).

h. A property owner's challenge to a utility policy involving the removal of debris left as a result of storm damage. Evans v Detroit Edison Co, unpublished opinion of the Court of Appeals, decided May 15, 2003 (Docket No. 239077).

i. Claims for breach of contract, negligence, invasion of privacy and fraud arising from the erroneous publication of a customer's name, address and telephone number in telephone directories. Cochran v Ameritech, unpublished opinion of the Court of Appeals, decided July 20, 2001 (No. 222558).

The City's Ordinance No. 00-344 attempts to exempt the City from the MPSC's uniform, statewide utility regulation, and the lower courts' opinions invite all municipalities in Michigan to similarly demand extensive, unnecessary underground replacement of utility lines at no cost to themselves. The MPSC's rules and tariffs are designed to prevent this exact type of wasteful expense, and unreasonable cost shifting from the City's taxpayers (who directly benefit from the underground replacement) to the utility's ratepayers (most of whom would not benefit at all). This case involves costs of over $14.5 million for only 4 miles of underground replacement (174a-181a). Such expenses would impose a massive burden for utilities, and ultimately a massive expense for their ratepayers.

The Legislature authorized the MPSC to regulate public utilities, and the MPSC adopted Rule 460.516 and Tariff provisions addressing the replacement of Edison's overhead lines with underground facilities. The City's complaint arises from a matter that is directly anticipated and addressed by the MPSC's regulatory scheme, thus invoking the primary jurisdiction doctrine.

Travelers, supra, 465 Mich at 208. Rinaldo's, supra, 454 Mich at 67. In Rinaldo's, this Court explained:

> "Where a customer asserts a cause of action arising purely out of the matters anticipated by the approved tariffs and code, i.e., the regulatory scheme, the doctrine of primary jurisdiction will require the court of general jurisdiction to defer to the MPSC. These matters, 'pertaining to, necessary, or incident to the regulation of' the public utility, MCL 460.6(1); MSA 22.13(6)(1), are within the authority of the MPSC." 454 Mich at 77 (emphasis added).

In a footnote, the Court further clarified:

> "In other words, we have decided the issue of primary jurisdiction as it applies to certain customer claims against a telephone company or other utility companies. Where such a claim is anticipated and governed by the MPSC tariff or regulatory scheme, the governing statutes . . . and the above policy considerations commit initial jurisdiction over an attack on the application of the tariff or regulation to the MPSC." 454 Mich at 77, n 15 (citations omitted).

The Legislature plainly contemplated that, if a municipality such as the City wishes to contest any utility practice, then it must file a complaint with the MPSC, and not in a court of general jurisdiction. Rinaldo's, supra, 454 Mich at 88. The City was not permitted to pass Ordinance No. 00-344 to circumvent the MPSC's regulatory scheme and shift its own payment obligations to Edison, then attempt to enforce that Ordinance in Circuit Court. The lower courts erred in ordering Edison to comply with the Ordinance, instead of recognizing that the Legislature authorized the MPSC to regulate public utilities, and the MPSC enacted statewide utility cost–allocation rules that the City blatantly attempted to avoid. This case falls squarely within MPSC's regulatory scheme, and the lower courts were required to defer to the MPSC's primary jurisdiction. As this Court has explained:

> "Primary jurisdiction over those claims covered by the tariffs allows the MPSC, through its regulatory expertise, to provide uniform and predictable results in the performance of its regulatory responsibilities. Allowing trial courts to resolve claims incident to

> the regulatory scheme, on the other hand, without the expertise of the MPSC, could lead to inconsistent application of the regulatory code or tariffs and competing standards for deciding when the regulatory scheme is operative." Rinaldo's, supra, 454 Mich at 76-77.

B. The MPSC Has Specific Statutory Jurisdiction to Hear Complaints By Municipalities Regarding Utility Practices.

In addition to the jurisdictional statutes discussed above, the Legislature also specifically authorized the MPSC to review municipal complaints regarding "any practice" of public utilities. Thus, if the City wished to take issue with Edison's overhead wires, the City was required to file a complaint in the MPSC pursuant to Section 4 of the Public Utilities Commission Act, MCL 460.54, which relevantly states:

> "[T]he municipality shall have the right to petition the commission to fix the rates and charges of said utility in accordance with the provisions of this act, or to make complaint as herein provided with reference to any practice, service or regulation of such utility, and thereupon said commission shall have full jurisdiction in the premises." (emphasis added).

Section 8 of the Public Utilities Commission Act, MCL 460.58, further states:

> "Upon complaint in writing that any rate, classification, regulation or practice charged, made or observed by any public utility is unjust, inaccurate or improper, to the prejudice of the complainant, the commission shall proceed to investigate the matter. . . .Upon completion of any such hearing, the commission shall have authority to make an order or decree dismissing the complaint or directing that the rate, charge, practice or other matter complained of, shall be removed, modified or altered, as the commission deems just, equitable and in accordance with the rights of the parties involved." (emphasis added).

Section 7 of the Transmission of Electricity Through Highways Act, MCL 460.557, similarly states:

> "The commission shall investigate each complaint against an electric utility submitted in writing by a consumer or a city, village, or township concerning the price of the electricity sold and delivered,

the service rendered, or any other matter of complaint." (emphasis added).

Finally, MCL 460.54 also grants the MPSC the "same measure of authority" over utilities as the Michigan Railroad Commission once had over railroads under the Railroad Commission Act. Section 22 of the Railroad Commission Act, MCL 462.22, relevantly provides that the Commission may investigate and order relief arising from a complaint by a "municipal organization, that any of the rates, fares, charges or classifications, or any joint rate or rates are in any respect unreasonable or unjustly discriminatory, or that any regulation or practice whatsoever affecting the transportation of persons or property or any service in connection therewith, is in any respect unreasonable or unjustly discriminatory, or that any service is inadequate." MCL 462.22(a) (emphasis added).

C. The APA and the Doctrine of Exhaustion of Administrative Remedies Similarly Require the MPSC to Consider These Types of Cases in the First Instance.

The lower courts' decisions also overlooked and thereby violated MCL 24.264 of the Administrative Procedures Act ("APA"), which requires that a court may not consider an action for declaratory judgment involving the applicability of an administrative rule "unless the plaintiff has first requested the agency for a declaratory ruling and the agency has denied the request or failed to act upon it expeditiously." The City made no such request to the MPSC; indeed, the City's entire course of conduct in this matter was designed to avoid the MPSC.

In addition, since an MPSC declaratory remedy was available and was not pursued by the City, the doctrine of exhaustion of administrative remedies prevents the courts from considering the City's claims. The exhaustion doctrine, like the primary jurisdiction doctrine, arises from the principle of separation of powers, and is founded on concern about the proper role of courts in a democratic society. Travelers, supra, 465 Mich at 197. In Citizens for Common Sense in Government v Attorney General, 243 Mich App 43, 52-54; 620 NW2d 546 (2000), the Court of

Appeals further explained why courts lack jurisdiction in a case such as this where the plaintiff failed to first invoke its declaratory remedy with the agency as required by the APA:

> "Our Supreme Court has stated that 'administrative law dictates that courts move very cautiously when called upon to interfere with the assumption of jurisdiction by an administrative agency.' Judges of the 74th Judicial Dist v Bay Co, 385 Mich 710, 727, 190 NW2d 219 (1971). This restraint is due, for the most part, because of the separation of powers. Id. From this, and other considerations, 'emanates the doctrine of exhaustion, by which courts have declined to act in contravention of administrative agencies where the remedies available through administrative channels have not been pursued to completion.'
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> * * *
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> "Because § 15 of the MCFA, and the APA, set forth an administrative remedy procedure subject to judicial review, we conclude that plaintiff is required to exhaust its administrative remedies under the MCFA and the APA before filing suit in the circuit court. Absent a request for a declaratory ruling that results either in a denial of the request or a declaratory ruling binding on the parties, the judiciary lacks jurisdiction over this cause." (emphasis added).

The Legislature's statutory enactments regarding public utilities and administrative procedures required the City to bring its Complaint for Declaratory Relief before the MPSC. The City instead attempted to circumvent the MPSC, first by adopting a self-serving ordinance purporting to exempt the City from the MPSC's statewide rules, and later by filing its complaint in Circuit Court. That Court should have dismissed the Complaint as required by the APA, and in accordance with the MPSC's authorizing statutes and primary jurisdiction.

D. Three Decisive Factors Confirm That the MPSC Has Primary Jurisdiction to Decide This Case.

When an administrative agency comprehensively regulates an area, such as the MPSC regulating the conduct and operation of public utilities, as discussed above, the courts must defer to the administrative agency's primary jurisdiction over the matter. This section further discusses the rationale for the doctrine of primary jurisdiction. This Court explained that:

> "Primary jurisdiction . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." Travelers, supra, 465 Mich at 200. (Citations omitted).

See also United States v Western P R Co, 352 US 59, 63-64; 77 S Ct 161; 1 L Ed 2d 126 (1956).

The three primary considerations that have been recognized for invocation of the primary jurisdiction doctrine are: (1) the need for the agency's specialized expertise; (2) the need for uniformity in deciding matters incident to the regulatory scheme; and (3) the potential that judicial resolution of the issue will have an adverse impact on the agency's performance of its regulatory responsibilities. Travelers, supra, 465 Mich at 198-99; Rinaldo's, supra, 454 Mich at 75-76. The Court of Appeals conducted only a superficial and incorrect analysis of the three factors (263 Mich App at 555-56, 187a-88a). All three factors support judicial deference to the MPSC here.

1. The MPSC's Specialized Expertise Is Needed.

On the first factor, the Court of Appeals incorrectly stated: "First, this is not a case where the MPSC's specialized knowledge would be invoked. The case does not directly involve utility rate structures, licensing or tariffs" (263 Mich App at 555, 187a). To the contrary, sections B-3.4(1)(f), B-3.4(5)(a)(1) and B-3.6(3)(b)(3) of Edison's electric Tariff directly control the proper outcome of this case (47a, 52a, 58a, referencing MPSC Rule 460.516, 27a). The MPSC plainly has expertise to interpret the Tariff and its own Rules, so the first primary jurisdiction factor favors deferral to the MPSC. Travelers, supra, 465 Mich at 207-208 (holding that the MPSC should decide that steam tariff case); Rinaldo's, supra, 454 Mich at 75-76.

Moreover, the MPSC enacted Rule 460.516 and the Tariff pursuant to its statutory authority, including MCL 460.6 and MCL 460.55 (quoted above). The MPSC anticipated the exact issue presented here, and codified the appropriate resolution of that issue as part of the regulatory scheme under which Edison provides utility service, and pursuant to the statutory authority that the Legislature provided to the MPSC. In contrast, Courts generally do not have experience and expertise with (1) underground utility systems, and (2) utility ratemaking, which are part of the MPSC's regulatory jurisdiction. Cost allocation and other ratemaking issues are legislative, not judicial. In re MCI Telecommunications Complaint, 460 Mich 396, 418; 596 NW2d 164 (1999) ("fixing and regulating utility rates is a legislative function"). The MPSC also has the engineering personnel and expertise to properly evaluate the City's improperly-constructed and unsafe conduit (160a-70a, 180a-82a). In these technical areas, the MPSC's knowledge is particularly specialized and extensive, so the MPSC should decide this case.

2. Uniformity Is Needed.

In considering the second factor, the MPSC Rules and Tariff should be uniformly applied statewide, further supporting deferral to the MPSC. Travelers, supra, 465 Mich at 208; Rinaldo's, supra, 454 Mich at 76. The Court of Appeals overlooked the MPSC's controlling Rules and Tariff, which have uniformly governed the replacement of overhead lines underground for more than 30 years.

The Court also incorrectly suggested that "uniformity can be, and has been, achieved through the courts." 263 Mich App at 556 (188a). The Court misapprehended and improperly extended the holdings in various cases it cited regarding "relocation" of utility facilities. 263 Mich App at 556-58 (188a-90a). Those cases involved **moving overhead lines to different overhead locations**, made necessary when certain projects required the abandonment or vacation of public rights-of-way.

None of the cited cases involved the **replacement of overhead lines with underground facilities**, which is substantially more difficult and expensive than pole-to-pole moves. None of the cited cases involved **replacement of existing lines within the same public right-of-way**. In contrast, in this case, the City has simply chosen to remove functioning overhead lines and replace them with underground facilities as part of a beautification project, and seeks to make Edison and other ratepayers bear the costs of the City's voluntary, purely aesthetic decision.

There is a need for statewide uniformity. The MPSC's Electric Rules Order in Case No. U-3001 and Rules regarding underground electric lines achieved that uniformity over 30 years ago. That uniformity is further codified in MPSC Tariff No. 9. That Tariff must be consistently applied, not ignored like it has been so far in this case. In discussing Edison's steam Tariff, this Court observed that a judicial decision "could lead to the imposition of liability that the MPSC might not otherwise recognize" Travelers, supra, 465 Mich at 208. Similarly, in discussing a telephone Tariff in Rinaldo's, supra, this Court reasoned that in regulating a utility's rate structure, the MPSC balances the utility's need to recover its costs plus a reasonable return, against the need to maintain affordable rates for the public. "Uniform results in applying the tariffs to customer claims are essential to prevent the [utility] from being exposed to unanticipated liabilities that will hinder its ability to offer affordable utility service." 454 Mich at 76.

This case presents the exact problem recognized in Travelers and Rinaldo's – the Circuit Court imposed a $14.5 million liability on Edison that directly contradicts MPSC Tariff No. 9. It is beyond credible dispute that relocating and burying lines involves excessive costs to the public that cannot be justified. Groncki v Detroit Edison Co, 454 Mich 644, 661; 557 NW2d 289 (1996) (lead opinion by Brickley, C.J.), and 453 Mich at 681 (Levin, J. dissenting) ("Nor should [Edison] be

required to bury underground electrical lines at prohibitive cost and resulting excessive increase in utility costs to consumers, businesses, and others").

From its inception, one of the MPSC's most important functions has been to control the costs of utility facilities to keep utility rates at a reasonable level. For example, our Legislature enacted 1929 PA 69 ("Act 69"), MCL 460.501 et seq, to prevent wasteful duplication of utility facilities and consequent excessive utility costs. In Huron Portland Cement Co v Public Service Comm, 351 Mich 255; 88 NW2d 492 (1958), this Court explained that the Legislature enacted Act 69 to:

> ". . . avoid a wasteful duplication of capital facilities, thus keeping the investment at the lowest figure consonant with satisfactory service." 351 Mich at 267, quoting Barnes, Economics of Public Utility Regulation, p 229.

This case similarly involves the wasteful duplication of utility facilities. There has been no malfunction with Edison's overhead lines along Telegraph Road. The City simply wants to remove them, and instead have lines placed underground. This destruction of functioning utility facilities and replacement with duplicative facilities is inherently wasteful. If the City wants to pursue this endeavor, then the City should pay for it, as the MPSC explained in its Electric Rules Order (findings D and E, 20a). Edison and its ratepayers should not bear the cost of the City's decision.

Further guidance is provided by the Missouri Supreme Court, which recognized the compelling need for statewide uniformity in rejecting a similar local ordinance requiring the underground replacement of utility facilities, and addressed the dangers now posed by the Court of Appeals' published opinion:

> "If [the City] had the right by its ordinance to specify how [the utility] should design and install its transmission lines or to require it to spend this substantially greater sum in constructing said lines, then other municipalities would have like authority. . . . If 100 such municipalities each had the right to impose its own requirements with respect to installation of transmission facilities, a hodgepodge of methods of construction could result and costs and resulting capital

requirements could mushroom." Union Electric Co, supra, 499 SW2d at 483.

The Court of Appeals' published opinion upholding the City's ordinance despite the MPSC's contrary Rules and Tariff invites other municipalities to mandate similar underground replacement requirements, which would lead to mushrooming capital costs and consequent rate increases for the State's electric customers. The MPSC's Rules and Tariff must be applied to achieve statewide uniformity, so the MPSC should decide this case under the second primary jurisdiction factor.

3. The Lower Courts' Resolution Of This Case Will Adversely Affect The MPSC's Ability To Perform Its Regulatory Responsibilities.

The Court of Appeals asserted that: "this is not a situation where a pervasive regulatory scheme is thrown out of balance. The ordinance does not conflict with the regulatory scheme." 263 Mich App at 556 (188a). To the contrary, the Ordinance directly contradicts the controlling Tariff and MPSC Rules. The MPSC "balanced" the regulatory interests to establish that scheme over 30 years ago in its Electric Rules Order and Rules regarding underground electric lines (18a-24a). The Courts' contrary decisions have thrown that regulatory scheme "out of balance" in this case. Moreover, the Court of Appeals' published opinion is precedentially binding (MCR 7.215(C), (J)), so repercussions can be expected in additional cases, further undermining the regulatory scheme that the MPSC established. Thus, the third factor weighs heavily in favor of deference to the MPSC's primary jurisdiction. Rinaldo's, supra, 454 Mich at 75-76.

E. Issues of Fact Must be Decided By the MPSC in the First Instance, and the City's Self-Serving Allegations Cannot be Presumed True in This Summary Disposition Appeal.

Edison initially responded to the City's Complaint by moving for summary disposition based on primary jurisdiction, as described above, and in accordance with MCR 2.116(B)(2). The City filed a cross motion for summary disposition, which the Circuit Court granted. The Circuit Court's grant

of summary disposition under MCR 2.116(C)(10) in favor of the City was inappropriate because the City failed to introduce evidence beyond the pleadings in support of its motion. MCR 2.116(G)(3); Maiden v Rozwood, 461 Mich 109; 597 NW2d 817 (1999). The Circuit Court further erred by denying Edison's request to answer the complaint (1/17/03 T, pp 7, 16, 145a, 154a). Edison took no action that could appropriately be viewed as a waiver of its right to answer the complaint, and to litigate factual matters in dispute.

In affirming the Circuit Court's decisions, the Court of Appeals repeated and amplified the Circuit Court's errors in relying on allegations and assumptions where the facts are disputed. As explained above, the Court of Appeals erroneously relied on MPSC Rule 460.517 (27a), which concerns the initial "construction" of lines. The appropriate outcome in this case is instead controlled by MPSC Rule 460.516 (27a), which concerns the "replacement of existing overhead lines." See also Tariff No. 9, §§ B-3.4(1)(f); B-3.4(5)(a)(1), and B-3.6(B)(b)(3) (47a, 52a, 58a). Even assuming that (1) a court, rather than the MPSC, can apply the MPSC Rules and Tariff, and (2) MPSC Rule 460.517 applies to utility line replacement in addition to new construction, the utility would still not bear the cost of such construction unless the construction was in a "heavily congested business district."

The City's own traffic study of Telegraph Road stated: "Based on the data collected, all intersections currently operate at acceptable levels of service" (68a). The City's traffic study did not indicate that overhead utility poles were considered a cause or factor in automobile crashes, nor did the City's traffic study recommend or even mention that underground utility facilities might help to lower the number of automobile crashes that occurred. Likewise, the City acknowledged that the issue of whether the Telegraph corridor was a heavily congested business district in the City had never even been discussed at any meeting (August 18, 2000 letter, p 2, item 6, 125a). The City's

own press release describing the claimed basis for the new Ordinance disclosed that the Ordinance was based upon purely aesthetic concerns, and did not even mention an issue of traffic safety (126a-27a). Moreover, the City is an Edison customer for street lights and traffic signals, as indicated above. Street lights and traffic signals are attached to poles. Replacing an Edison electric utility pole (to which a street light is attached) with a "decorative street lighting" (126a, 171a) pole is essentially a "wash" from a safety perspective. Assuming automobile crashes are even relevant, there are still poles to crash into (129a, photographs of decorative street lighting and utility poles). The Court of Appeals erred by accepting the "reasons" that the City drafted into its own Ordinance as true (263 Mich App at 558-59, 190a-91a), and disregarding the evidence that the City's Ordinance was merely a beautification project and that the City drafted the ordinance specifically to avoid the MPSC's cost allocation and to shift liability for underground replacement costs from itself to Edison.

CONCLUSION AND RELIEF REQUESTED

The City's "reasonable control" over its streets is limited to matters of local concern, and must yield to state control over statewide interests. The MPSC has broad statutory authority over the rates, terms and conditions of utility service. The MPSC's Rules and Tariff provisions require that a customer or municipality seeking to replace existing overhead electric lines with underground facilities must pay for resulting costs. The MPSC thoroughly considered this matter over 30 years ago, and appropriately concluded that cost causers should be cost payers. Utility ratepayers should not bear the expenses caused by relatively few ratepayers who want underground facilities for their own benefit. The City's Ordinance is contrary to, and designed to avoid, the MPSC's well-established allocation of cost responsibility. Therefore, Edison respectfully requests that this Court reverse the Court of Appeals' decision and invalidate the City's Ordinance. In the event that this

Court's opinion does not resolve all of the outstanding issues, Edison further requests that the Court remand this case to the MPSC to resolve those remaining issues.

Respectfully submitted,

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